SULLIVAN & WORCESTER

Sullivan & Worcester LLP
1633 Broadway
New York, NY 10019

T 212 660 3000
F 212 660 3001
www.sandw.com

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BY E-FILING
Hon. Vernon S. Broderick
United States District Judge
United States District Court
Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square, Room 415
New York, New York 10007

Re: Ambridge v. Domino Media Group, Inc., et ano.
15 Civ. 9944 (VSB)

Dear Judge Broderick:

We represent defendants Domino Media Group, Inc. and Cliff Sirlin (collectively, "Domino") in the above-referenced action. Pursuant to the Court's Individual Practices, we are writing to respectfully request a pre-motion conference with respect to Domino's contemplated motion to compel arbitration and to dismiss this proceeding.[1]

As more fully described below, the undersigned counsel and Domino very recently became aware that plaintiff Brittany Ambridge ("Ambridge"), a former employee of Domino, agreed to arbitration as the exclusive forum for prosecuting all disputes against Domino, including her current claims for overtime compensation and wrongful termination/retaliation.

BACKGROUND

Domino is a home décor magazine and retail website. Ambridge is the former Photography Director of the magazine. Domino is a customer of TriNet Group, Inc. ("TriNet"), which provides payroll processing and certain human resources services for Domino (among numerous other TriNet clients).

Ambridge recently served a Subpoena Duces Tecum upon TriNet. In response, TriNet, in early January 2017, produced several documents, including a Terms and Conditions Agreement ("TCA"). The TCA was agreed-to by Ambridge. It includes a Dispute Resolution Protocol ("DRP") that contains the subject binding arbitration clause. The DRP expressly covers not only TriNet and Ambridge, but Domino as well as the "worksite employer". However, as TriNet administers the TCA, Domino and the undersigned counsel were previously unaware of the agreement to arbitrate contained therein.

[1] Spencer-Franklin v. Citigroup/Citibank N.A., 2007 U.S. Dist. LEXIS 11625, *11-*12 (February 21, 2007) (dismissal, as opposed to stay, proper when arbitration compelled).

{N0482754; 1}

THE AGREEMENT TO ARBITRATE

On or about June 9, 2013, shortly after beginning her employment with Domino, Ambridge logged on to TriNet's online portal, "TriNet Passport". Upon signing in, she was electronically presented with TriNet's TCA, which included the DRP, and Ambridge accepted the TCA and the terms thereof. The TCA provides, in pertinent part:

"1. **Co-Employment vs. Standard Employment.** If your relationship with TriNet is beginning because the company at which you work has become a TriNet customer, this means that your company has entered into a customer service agreement with TriNet to share certain employer responsibilities as co-employers. This means TriNet will be your employer of record for administrative purposes and will process payroll, sponsor and administer benefits, and provide certain human resources services. As your worksite employer, your company retains the responsibilities of directing your day-to-day work and managing its business affairs. This TCA addresses your relationship with TriNet and you and your worksite employer have and will continue to have additional terms and conditions of employment . . . ."

"9. Dispute Resolution Protocol ("DRP")

a. How The DRP Applies. This DRP covers any dispute arising out of or relating to your employment with TriNet. The Federal Arbitration Act applies to this DRP. Also, existing internal procedures for resolving disputes, as well as the options of mediation, will continue to apply with the goal being to resolve disputes before they are arbitrated. This DRP will survive termination of the employment relationship. **With only the exceptions described below, arbitration will replace going before a government agency or a court for a judge or jury trial . . . ."**

"d. How Arbitration Proceedings Are Conducted. In arbitration, the parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence as needed to present their cases and defenses . . . ." (Underline added).

"f. Enforcement Of The DRP. This DRP is the full and complete agreement relating to arbitration as the means to resolve covered disputes between you and TriNet and between you and your worksite employer unless the DRP is waived by your worksite employer or superseded by other terms and conditions of your employment with your worksite employer. If any portion of this DRP is determined to be unenforceable, the remainder of this DRP still will be enforceable, subject to the specific exception in section d, above. **With respect to covered disputes, each party waives any rights under the law for a jury trial and agrees to arbitration in accordance with the terms of this DRP.** (Underline added).

The last subsection of the TCA is entitled "Acknowledgement" and provides, in pertinent part: "By clicking below, I am acknowledging that I have read and understand the contents of this Terms and Conditions Agreement (including, but not limited to, the DRP) . . . ." Ambridge agreed to the TCA by providing her email address and clicking on the button marked "I Accept."

THIS COURT SHOULD COMPEL ARBITRATION AND DISMISS THIS ACTION

Numerous courts have reviewed this precise TriNet TCA/DRP, expressly held that it applies to employment-related disputes between employee and worksite employer, and compelled arbitration. Langford v. Hansen Technologies, LLC, 2014 U.S. Dist. LEXIS 184878, *7-*8) (S.D. Cal. Nov. 19, 2014); Zelkind v. Flywheel Networks, Inc., 2015 U.S. Dist. LEXIS 141367, *12-*13 (N.D. Cal. Oct. 16, 2015); see, e.g., Cicogna v. 33Across Inc., 2016 U.S. Dist. LEXIS 170492 (S.D. Cal. Dec. 8, 2016);Young v. SixAgency, Inc., 2015 N.Y. Misc. LEXIS 4710 (Sup. Ct. NY Cty. Dec. 23, 2015). The arbitration provision should be enforced here.

Ambridge has refused to agree to arbitration because the case has been in this Court "a lot of time", presumably arguing waiver. This argument fails.

"Because of our strong presumption in favor of arbitration, such a waiver is not to be lightly inferred." LG Elecs., Inc. v. Wi-Lan USA, Inc., 623 Fed. Appx. 568, 569 (2d Cir. 2015). "The key to a waiver analysis is prejudice. Waiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated." Id.; Sutherland v. Ernst & Young, LLP, 600 Fed. Appx. 6, 8 (2d Cir. 2015) (same). Prejudice is generally only found when "a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration", or when the party seeking arbitration has caused his adversary to incur "unnecessary delay or expense." Id. "This Court has refused to find waiver in a number of cases where a delay in trial proceedings was not accompanied by substantial motion practice or discovery." Id.

Here, there have been no motions or court decisions, and therefore Domino is not seeking to relitigate any issue. Further, discovery to date has been minimal, with the parties merely exchanging documents, responding to the limited SDNY interrogatories, and taking only two depositions, solely of the parties (Ambridge and Sirlin). Given that the DRP provides that the parties "have the right to conduct adequate civil discovery" in arbitration, this discovery would have occurred in arbitration and therefore there has been no "unnecessary" expense.

Moreover, although this case was filed a little over twelve months ago, the parties have agreed to delay the case on three occasions, for at least six months, to pursue or continue mediation -- requests this Court granted (see Doc. Nos. 22, 26 and 28). Hence, this case has been active for only six months at most, and Domino should not be penalized for the parties taking the time to try and settle. Thomas v. A.R. Baron & Co., 967 F. Supp. 785, 789 (S.D.N.Y 1997) (no waiver when "delay in litigating the case is the responsibility of both parties). In any event, as set forth above, delay of time alone is insufficient to constitute a waiver and courts have rejected waiver for similar or longer time frames. Id. (18 months); Acquaire v. Canada Dry Bottling, 906 F. Supp. 819, 830 (E.D.N.Y. 1995) (three years); Rush v. Oppenheimer & Co., 779 F.2d 885, 887 (2d Cir. 1985) (eight months); Sutherland, supra (four months).

Respectfully submitted,
/s/ Gerry Silver
Gerry Silver, Esq.